

The respondent requests review of the nature and extent of disability. Respondent argues claimant failed to meet her burden of proof to establish that she is permanently and totally disabled. Respondent further argues that claimant should be limited to her 20 percent functional impairment because she failed to put forth any effort to find employment post injury.

Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as if specifically set forth herein.

Briefly stated, after claimant injured her low back lifting a box at work she was provided medical treatment. Ultimately, Dr. Gery Hsu performed an L4-5 anterior lumbar interbody fusion on claimant's back on November 29, 2004. Unfortunately, the surgery did not relieve claimant's symptoms and claimant underwent a second anterior lumbar fusion at the L5-S1 level by Dr. Hsu on January 9, 2006. The second surgery also failed to relieve claimant's low back symptoms.

At the time of the regular hearing claimant was taking seven different medications daily for pain which were prescribed by Dr. James Moffitt. She also uses a heating pad at night for pain as well as a TENS unit. Claimant testified that Dr. Moffitt was recommended by Dr. Hsu so that she would not have to travel to Wichita for pain management.

Claimant testified she is currently having pain in her mid back down to her toes in the left leg. She is in constant pain even with the medications. When Dr. Murati examined claimant he noted she had second degree burns on her lower back from using the heating pad to relieve her ongoing back pain. Dr. Moffitt also prescribed Cymbalta for claimant's depression which respondent has denied payment. Claimant is not able to sweep or mop floors, vacuum carpets, no crawling on her knees, no making beds and she doesn't drive a car due to all of the medications that she is taking. Claimant testified she has not looked for work since she left respondent's employment because her pain and the medications she is taking prevent her from working.

On September 5, 2006, Dr. Paul Stein performed an examination and evaluation of claimant at the request of the respondent's attorney. Based upon his examination, the doctor determined claimant was at maximum medical improvement because claimant was

not a candidate for additional surgery and also recommended a psychological evaluation due to possible symptom magnification.¹ The doctor did not find any burns on claimant's lower back. A functional capacity evaluation was performed on November 29, 2006, and permanent restrictions were imposed. Dr. Stein adopted those FCE restrictions which were to avoid occasional bending/stooping, trunk twisting, climbing ladders or reaching above shoulder height, avoid frequent squatting, pushing, pulling, climbing stairs, standing and walking, avoid constant kneeling, forward reaching, forceful grasping, fine hand manipulation and simple grasping. Based upon the *AMA Guides*², Dr. Stein opined claimant suffered a 20 percent permanent partial functional impairment due to lost motion segments from the fusions. Dr. Stein noted that upon review of the claimant's medical records he questioned whether the second surgery resulted in a successful fusion and that could explain some of claimant's continued pain complaints.

Dr. Stein reviewed the list of claimant's former work tasks prepared by Ms. Karen Terrill and concluded claimant could no longer perform 17 out of the 57 tasks which results in a 30 percent task loss. The doctor also reviewed Mr. Hardin's task list of claimant's former work tasks and opined claimant was not able to perform 15 out of 52 non duplicated tasks resulting in a 29 percent task loss.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, examined claimant on February 6, 2007, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with failed back surgery syndrome, status post L4-5 anterior lumbar interbody fusion with infuse Bone Morphogenetic Protein bone grafting and placement of LT cages and Bone Morphogenetic Protein bone graft, status post Transabdominal exposure to L5-S1 for an L5-S1 anterior lumbar interbody fusion using the Sofamor Danek LT cage system using right posterior iliac crest harvest and graft through a separate incision. Based upon the *AMA Guides*, the doctor concluded claimant had a 20 percent whole person functional impairment with regard to Lumbosacral DRE Category IV. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no crawling or lift/carry/push/pull greater than 10 pounds and that only occasionally. Claimant should rarely bend, crouch and stoop. She should occasionally sit, stand, walk, climb stairs or ladders, squat or drive. She should limit frequent lift/carry/push/pull to 5 pounds and allowed to rest every two hours for 30 minutes. The doctor recommended that claimant be afforded a better course of pain management than she had received.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Hardin and concluded claimant could no longer perform any of the tasks due to being essentially

¹ Claimant was referred to Dr. Ted Moeller for a psychological evaluation but that report was not made a part of the evidentiary record.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

and realistically unemployable. Dr. Murati opined claimant was not able to perform any of these tasks because of the 30-minute rest period every 2 hours.

Karen Terrill, a vocational rehabilitation counselor, conducted a personal interview with claimant on November 13, 2007, at the request of respondent's attorney. She prepared a task list of 38 nonduplicative tasks claimant performed in the 15-year period before her injury. Ms. Terrill thought claimant was capable of working as a customer service representative with cargo or freight plus a bill or an account collector. Claimant had not attempted to look for work. Ms. Terrill opined claimant was capable of earning from \$11.44 to \$14.70 an hour or between \$457.60 and \$588 a week.

Ms. Terrill testified claimant had not registered with the Job Service Center, she hadn't applied for state Vocational Rehabilitation Services nor did she have any intention on returning to school. Ms. Terrill testified that if Dr. Murati's restrictions were utilized and Dr. Murati opined claimant was realistically unemployable from a medical standpoint then she would defer to his opinion.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on April 4, 2007, at the request of claimant's attorney. He prepared a task list of 93 tasks claimant performed in the 15-year period before her injury. Mr. Hardin opined claimant is not able to obtain and perform substantial, gainful employment based on Dr. Murati's restrictions. Using Dr. Stein's restrictions, Mr. Hardin opined claimant was capable of earning \$5.15 to \$6.50 per an hour.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.³

³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In *Wardlow*⁴, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The claimant has had two back fusion surgeries that have failed to relieve her back pain. She has been diagnosed with chronic pain and has not been found to be magnifying her symptoms. Dr. Stein questioned whether the second surgery resulted in a successful fusion. The claimant testified that she is in constant pain to such a degree that she has suffered burns to her back from a heating pad in an attempt to alleviate her back pain. She is fearful of driving because of the medications she is taking, rarely leaves her house and cannot sit for very long because of her chronic back pain.

Dr. Murati opined that claimant is essentially and realistically unemployable and needs pain management treatment. Mr. Hardin and Ms. Terrill agreed that Dr. Murati's restrictions render claimant essentially and realistically unemployable. And the only significant difference between the doctor's restrictions was Dr. Murati's restriction that claimant be afforded a 30-minute rest period every 2 hours. And even the FCE restrictions adopted by Dr. Stein recommended at least frequent alternating between sitting and standing.

The ALJ analyzed the evidence and commented in pertinent part:

It is interesting to note that both Dr. Murati and Dr. Stein place the claimant in the same DRE category and rate her a 20% whole person impairment. Further, the restrictions and tasks lost based on the restrictions are not all that different except Dr. Murati's restriction of rest for 30 minutes every 2 hours. Dr. Murati stated that he would have a different opinion of the claimant's ability to work if she did not have burns. Dr. Murati's evaluation is the most recent in time. Dr. Stein was not sure whether the claimant had a complete fusion after her last surgery and stated that it could account for some of her pain. Apparently the claimant has been diagnosed with chronic pain and has not been found to be magnifying her symptoms. Based on all the evidence provided, this court finds that the claimant is essentially and realistically unemployable and is incapable of engaging in any substantial and

⁴ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

gainful employment. Therefore, the claimant is found to be permanently totally disabled.⁵

The Board agrees and affirms.

The claimant requested payment of a \$95 outstanding medical bill related to her ongoing visits with Dr. Moffitt for management of her chronic pain. Claimant testified that Dr. Hsu suggested she see Dr. Moffitt for such continued monitoring. Glenda Smith, office manager for Family Practice Associates, testified there is an outstanding bill for \$95 which was an office visit on May 7, 2007, wherein claimant had a follow-up visit for her pain control and depression related to her May 2003 accident. Ms. Smith further testified that all claimant's previous visits and even a subsequent visit had been paid for by the workers compensation insurance carrier. As this ongoing pain management was paid for and claimant was not disabused of her ability to continue such treatment, the respondent is ordered to pay the \$95 outstanding medical bill.

Because of respondent's refusal to pay this bill it is unclear whether Dr. Moffitt is still authorized to continue to monitor claimant's condition. Dr. Murati noted that claimant needed to be enrolled in a better course of pain management.⁶ Consequently, the respondent is to provide claimant a list of three physicians for claimant to select one to provide ongoing treatment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 4, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2008.

BOARD MEMBER

BOARD MEMBER

⁵ ALJ Award (Jan. 4, 2008) at 7.

⁶ Murati Depo., Ex. 2.

BOARD MEMBER

- c: Randy S. Stalcup, Attorney for Claimant
 Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
 Pamela J. Fuller, Administrative Law Judge